85-1814

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1985

ROBERT B. EUBANK, PETITIONER
INDIVIDUALLY AND ON BEHALF OF
ALL OTHER SHAREHOLDERS OF
LEE LUMBER COMPANY, LTD.,

vs.

LEE LUMBER COMPANY, LTD.,
Respondent

vs.

INTERNATIONAL PAPER COMPANY,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether dismissal of a complaint claiming to state an unprescribed cause of action as having stated another action held prescribed, is res judicata to a subsequent suit on the former unprescribed cause of action.

2. Whether an award of attorneys' fees may be made against an appellant for filing a frivolous appeal, where appellant's motion for a hearing on the substantiality of the issues on appeal was denied, and the only evidence of record was affidavits and opinions from other attorneys and professors of law that appellant's cause was not frivolous but correct.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the District Court below appears at 617 F.Supp. 614 (1985), and is reproduced at Appendix D., p. 1, together with the District Court judgment. The opinion of the Court of Appeals below is unpublished and is reproduced at Appendix D, p. 8, together with orders on motions for rehearing and rehearing en banc.

JURISDICTION

The judgment sought to be reviewed herein was rendered and entered December 20, 1985 by the Court of Appeals for the Fifth Circuit. Petitions for rehearing and for rehearing en banc were denied respectively on January 31, 1986 and February 4, 1986. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V.

Constitution of the United States, Amendment XIV.

Federal Rules of Civil Procedure, Rule 56(c).

Federal Rules of Appellate Procedure, Rule 38.

Local Rule 47.6, Court of Appeals for the Fifth Circuit.

Louisiana Civil Code, Arts. 2032, 2034, 2221, 2464, 3542.

Louisiana Code of Civil Procedure, Art. 424.

28 U.S.C. 294(b), -(c), -(d), -(e).

28 U.S.C. 137.

Pursuant to United States Supreme Court Rule 21.2(f), the above are set forth verbatim at Appendix F.

STATEMENT OF THE CASE

If a landowner's neighbor were to misread an architect's plans, for example, and build a brick fence that lay partly upon the landowner's lot, the landowner could file a suit against the neighbor for removal of the fence. Ordinarily he would succeed. All the more so, if the local court had recently rendered judgment (since affirmed on appeal) removing such a fence from another's land, built under the same circumstances.

Suppose however the judge construed the suit as an action in tort, for the neighbor's negligence in following the architect's plans, and dismissed the suit for the reason that limitations on actions in tort ran in one year (the suit having been brought after that time).

While the owner's frustration would be intense, his attorney ought to reassure him. Simply because the tort action (whether or not that were the proper cause of action) had prescribed, does not mean that other causes of action which have not prescribed cannot still be brought. For example, trespass, or an action of unlawful detainer, both of which (for a start) continue to accrue so long as the fence is there. The judge's mistake may be lamentable, the attorney would advise, but it is not fatal to the owner's cause. Any other cause of action that lies may still be brought, as long as it has not prescribed. The prior judgment disposed of only the cause of action held prescribed, and is res judicata

only to bringing the same cause of action again - not to bringing another cause of action.

The attorney might relate the reasons for such a rule. In olden days, there was not just one form of lawsuit, but many - many "causes of action," as they were called. They were quite technical in form, and susceptible to being misstated and dismissed for various defects having nothing to do with the merits of the situation - including, notably, prescription. Since statutes of limitation were drawn up on particular causes of action, the limitations on one form of action did not bar another, nor did a judgment of dismissal for prescription of one cause of action bar the later bringing of another. In more enlightened times, we have only one form of action. Ideally a court will consider any of the old "causes of action" that might lie in the facts pleaded, in determining whether the entire suit has prescribed. But should the court fail to do so, such is the genius of the law that suit may be brought again successfully on the ignored, unprescribed causes of action - whether they were originally overlooked through error of the litigant and his attorney, or the court.

However an attorney familiar with the case below might instead advise as follows. Should the landowner persist in attempting to state a correct, unprescribed cause of action, over a ten-year period the district court will studiously ignore the previous factually identical case; decline to mention it in three straight opinions; withhold those three opinions themselves from publication; and summarily dismiss all such subsequent litigation as barred by res judicata. As for the court of appeals, it will twice affirm without opinion, in violation of its own rules; refuse also to distinguish or mention the case in point (previously affirmed by it); and also withhold its actions from publication. On the third appeal, it will issue an opinion, also unpublished, awarding sanctions against the landowner for

filing a frivolous appeal. In so doing it will take no notice either of testimony of several attorneys that the appeal and the landowner's position are correct, or of the complete absence of any opposing evidence from the neighbor building the fence.

The Lease

In 1946 Lee Lumber Company, Ltd. ("Lee") leased some 18,000 acres of timberlands, near Alexandria, Louisiana, to International Paper Company ("International") until 2006. Under the timber lease's terms, the rent was $1,400.00, or 7.7¢ per acre, per year. International was also to pay property taxes on its timber and leasehold, Lee to pay such taxes only on the land's residual value. A 1950 amendment increased International's rent to $1,400.00, plus the excess (if any) of Lee's property taxes over that amount - in short, annual reimbursement of the prior year's property taxes.

By separate contract International bought the timber then standing on the lands, for $150,000.00, or $8.33 per acre.

The parties provided that neither the lease nor the timber sale was consideration for the other. The lease, noting the timber sale, specifically stated that its own agreed "primary purpose" was the growing of forest products in the future and that "the consideration paid herefor covers all such rights and privileges as herein provided." The lease reserved to International a right to cancel it in whole or in part at any time, without affecting the timber sale.

The Litigation

The Contentions That The Lease is Void. First Lee, then petitioner, have contended for over 10 years that the lease is void. The contentions are two:

(1) that under Louisiana law the rent or consideration was not "serious," was "out of all proportion" to the value of the lease, La.C.C. Art. 2464; *Murray v. Barnhart*, 42 So. 489 (La. 1906); *Northeast Louisiana Detachment of Marines v. Monroe*, 253 So.2d 107 (La.App. 1971); *L. L. Brewton Lumber Co., Inc. v. Continental Can Co. Inc.*, U.S.D.C., W.D.La. No. 14680 (12/11/71),[1] affirmed 480 F.2d 923 (5th Cir. 1972); and

(2) that International's right to cancel also subjected that consideration to a "potestative condition" rendering a contract void[2] under Louisiana Law, La.C.C. Art 2034, *Murray* (supra), and other cases.

Judge Scott's Brewton Lumber Co. Opinion. The same district judge below, in *L. L. Brewton Lumber Co. v. Continental Can Co.*, canceled renewals (totaling 99 years) of a timber lease, because the only rent was payment of ad valorem taxes. He noted that whether such rent supported a valid lease was the issue; that Louisiana law required a serious consideration for a contract to be valid; that property tax reimbursements by definition leave no conceivable profit to the lessor (since the lessor has already incurred a like expense); and that this would not be sufficient consideration "even if there were no timber on the property and the land were bare." The opinion concluded:

"Under no conditions can rent, consisting solely of the reimbursement of taxes, be considered serious consideration as contemplated by Louisiana law." *L. L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc.*, Appendix A, pp. 7-8.

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[1] Appendix A hereto.

[2] In similar manner, a contract is void at common law for want of "mutuality of obligation."

The Fifth Circuit affirmed *Brewton Lumber Co.* It has been neither overruled nor qualified to this date.

Lee I. Lee filed the first suit[3] ("Lee I") in the Louisiana courts[4] in 1973. International moved for a dismissal, arguing that the cause of action stated was the "action of nullity or rescission," and that it had prescribed under Louisiana Civil Code Articles 2221 and 3542 (providing for prescription within five and ten years, respectively). The Louisiana lower courts dismissed Lee I solely for prescription of that action. The Louisiana Supreme Court declined certiorari. However it disavowed the conclusion of law below with the observation that

> "because the facts relied on by the court of appeal show serious consideration, the result reached is correct."[5]

Among others, the late Judge Albert Tate[6] of the Fifth Circuit, then a Louisiana Supreme Court Justice, dissented. He noted that

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[3] Lee Lumber Co., Ltd. v. International Paper Co., 321 So.2d 42 (La.App. 1975), cert. den. 324 So.2d 423 (La. 1976), 345 So.2d 212 (La.App. 3rd Cir. 1977), cert. den. 347 So.2d 503 (La. 1977).

[4] Lee's counsel at this time were unaware of the Brewton Lumber Co. case, although it had already been decided.

[5] An opinion below had remarked that tax reimbursements over 22 years had amounted to $105,814, Lee Lumber Co., Ltd. v. International Paper Co., 345 So.2d 212 (La.App., 1977), p. 214. Substantial as a figure standing alone, the adequacy of $105,814 as rent for 18,000 acres for 22 years was never tried, as it had been in the Brewton Lumber Co. case. The sum works out to about 27 cents per acre per year.

[6] During his tenure on the Fifth Circuit, Judge Tate never sat on a panel considering any of the Lee Lumber Company appeals. Judge Tate died in early 1986.

"The majority has found facts justifying a holding of serious consideration, never passed upon by the previous courts. The majority thus does not reach the issue posed by the court of appeal holding, 321 So.2d 42 (La.App. 3rd Circuit, 1975), that actions to declare a null lease are prescribed by Civil Code Articles 2221, 3542. This court should have granted writs to decide this important issue, which in my opinion was incorrectly decided below." *Lee Lumber Co. Ltd., v. International Paper Co.*, 347 So.2d. 503, p. 504.

As convinced as Judge Tate that unprescribed causes of action lay to avoid a null lease that did not expire until 2006, Lee determined to pursue the matter further.

Lee II (The Case Now Held To Be Res Judicata). Lee brought the second suit[7] ("Lee II") in federal district court before Judge Nauman S. Scott, author of the *Brewton Lumber Co.* opinion. Lee II sought a declaratory judgment that the lease was void, and recited as its underlying causes of action the action to quiet title, the possessory action, the action for recovery of a thing not due, and the action of eviction, none of which had prescribed.

International moved for summary judgment, arguing that the cause of action stated was nullity or rescission and that it had prescribed.[8] The District

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[7] **Lee Lumber Co., Ltd. v. International Paper Co., U.S.D.C., W.D.La., No. CA-77-1097 (11/7/78), affirmed 5th Cir. No. 79-1309 (5/15/80) (Appendix B hereto).**

[8] **Both Northeast Detachment of Marines and Brewton Lumber Co. canceled leases for want of serious consideration, well after expiration of the (maximum) ten year limitations on the action of nullity or rescission.**

Court granted summary judgment, dismissing Lee II on that ground only.

Lee III. Lee then refused further litigation, citing expense and lack of results. Petitioner, an attorney and shareholder of Lee, filed the third suit[9] ("Lee III") in federal district court as a shareholder's derivative suit. Lee III claimed to assert an unprescribed possessory action directly, as opposed to asserting it in support of a declaratory judgment action. Upon International's motion, however, the District Court again granted summary judgment dismissing the suit on grounds of res judicata (though agreeing that the possessory action had not prescribed).

The Affirmances of Lee II and Lee III. The Fifth Circuit affirmed Lee II and Lee III under Local Rule 47.6, without opinion, unpublished. That rule provides for such an affirmance only where the "dispositive" issue is whether the trial court's findings of fact were "not clearly erroneous."[10] Lee II and Lee III made no findings of fact. The summary judgments below would have been improper, under FRCP 56(c), unless "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." No findings of fact having been made by the trial court, it is uncertain exactly what the affirmances held.

Petitioner filed Lee IV (*infra*) and sought writs of certiorari on Lee III from the United States Supreme Court, but writs were denied. A motion by Interna-

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[9] Eubank v. Lee Lumber Co., Ltd. v. International Paper Co., U.S.D.C., W.D.La., No. CA-82-1446 (2/3/83), affirmed 5th Cir. No. 83-4112 (10/27/83), cert. den. U. S. Sup. Ct., No. 83-1918 (10/1/84)

[10] A requirement the Fifth Circuit has promised is to be strictly construed. See N.L.R.B. v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990, 430 F.2d 966 (5th Cir. 1970).

tional for sanctions against petitioner was specifically rejected.

Lee IV (The Case Now On Appeal). In the meanwhile, petitioner had filed the fourth suit[11] ("Lee IV"), which stated a direct action to quiet title. Upon cross motions for summary judgment, Judge Scott[12] granted International's motion and dismissed Lee IV. He held that all previous litigation was res judicata to Lee IV, ruling that under Louisiana law any prior decision arising for the same set of facts was res judicata to any subsequent litigation.[13]

The Court of Appeals affirmed, but held only Lee II to be res judicata. International moved for attorney's fees and costs against petitioner. Petitioner moved for a hearing, which motion was denied. Petitioner also submitted extensive opinions and affidavits

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[11] Eubank v. Lee Lumber Co., Ltd. v. International Paper Co., 617 F.Supp. 14 (W.D.La.1985), affirmed 5th Cir. No. 85-4509 (12/20/85).

[12] After petitioner filed Lee IV, Judge Scott retired and the case was assigned to his successor. However by minute entry of February 4, 1985, Judge Scott reassigned the case to himself, on his own motion, without (according to the clerk of the Western District of Louisiana) designation by the chief judge or the judicial council, as required by 28 U.S.C. 294(b), -(c), (d) and -(e), or 28 U.S.C. 137.

[13] Judge Scott held that Mitchell v. Bertolla, 340 So.2d 287 (La. 1976), holding that under Louisiana res judicata the same cause of action can be brought yet again if upon different factual grounds, in effect equated facts with cause of action and allowed only one action from the same facts.

from attorneys and professors of law[14] to the effect

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[14] They were:

Prof. Saul Litvinoff Baton Rouge, Louisiana	L.L.D.; S.J.D.; J.D.; S.C.D; C.D.; Professor of Law, Louisiana State University; Author, Louisiana Civil Law Treatise, Vols. 6-7, Obligations (1975); Reporter, Obligations Committee, Louisiana State Law Institute; principal author of 1984 revisions to Louisiana Civil Code on Obligations
Nicholas L. Chiarkas Washington, D. C.	Member, Alabama and Pennsylvania Bar Associations; J.D., Temple University Law School, 1978; former Professor of Law, Cumberland Law School, Birmingham, Alabama; former Deputy Chief Counsel, U.S. Permanent Subcommittee on Investigations; Deputy Chief Counsel, President's Commission on Organized Crime
James S. Gravel Alexandria, Louisiana	Ll.B., Louisiana State University School of Law, 1959; Member, Louisiana Bar Association, 1959
Edward G. Randolph, Jr. Alexandria, Louisiana	J.D., Tulane University School of Law, 1967; Member, Louisiana Bar Association, 1967; former member, Louisiana House of Representatives, Louisiana Senate
Robert B. Eubank (petitioner) Birmingham, Alabama	Member, Louisiana Bar Association (1968) and Alabama Bar Association (1973); J.D., Harvard University School of Law, 1967; Ll.M. (in Taxation), New York University School of Law, 1973; former Adjunct Professor and Professor of Law, Cumberland Law School, Birmingham, Alabama

Professor Litvinoff's opinion is at Record, pp. 440-463. Affidavits of the latter four are attached as Appendix E.

that petitioner's position was not frivolous, and was in fact correct at law. International submitted no opposing evidence on its motion. However the Court granted International's motion and imposed attorney's fees and costs upon petitioner.

Unpublished Opinions. Despite the precedential, even novel, conclusions of law reached in Lee II, III and IV, the District Court and Court of Appeals opinions and non-opinions were all withheld from publication (with the exception of the District Court's Lee IV opinion, which was eventually forwarded to West Publishing Company and published at West's request).

Basis for Federal Jurisdiction Below

The basis for federal jurisdiction in the District Court below is diversity of citizenship and amount in controversy, under 28 U.S.C. 1332.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The most compelling reason for which petitioner seeks review is the preservation of the dignity of the courts, and the respect in which they are held by the public and members of the bar.

A disinterested observer might deduce, rightly or wrongly, that the Fifth Circuit's principal dissatisfaction with petitioner's position below has been, not its error, but its correctness. As to the merits of whether the lease is void, the clear precedent of the *Brewton Lumber Co.* case has been strictly avoided, not overruled, distinguished or qualified. As to res judicata, causes of action, and prescription, it is doubtful that any attorney or court solemnly entertains the conviction that all causes of action to cancel a lease which lacks legal consideration, have run before the lease itself expires.

Res Judicata and Prescription

Louisiana, like common law states, recognizes various "causes of action," including the "action to quiet title" which it has borrowed from the common law states.[15] Common law authority is that the quiet title action lies to avoid a lease which is null for want of legal consideration, a lessee's option to cancel, and a lessee's breach.[16] Beyond doubt, the prescription of one cause of action does not bar the bringing of another. *Duer & Taylor v. Blanchard, Walker, O'Quin, & Roberts*, 558 F.2d 328 (5th Cir. 1977), 354 So.2d 192 (La. 1978), 568 F.2d 472 (5th Cir. 1978). For example, a prior dismissal for prescription of the possessory action, does not subsequently bar the bringing of a petitory action.[17]

Further Louisiana res judicata is more permissive of re-litigation, and more reluctant to prohibit it, than common law res judicata.[18] Even where the same cause of action was previously brought on one factual grounds, it is not a bar to the subsequent bringing of the same cause of action again on different factual grounds.[19]

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[15] Daigle v. Pan American Oil Co., 108 So.2d 516 (La. 1958); Harrison v. Alombro, 341 So.2d 1165 (La.App. 1977) cert. den. 343 So.2d 1063; Walmsley v. Pan American Oil Company, 153 So.2d 375 (La. 1963).

[16] Rich v. Donaghey, 177 Pac. 86 (Okla. 1918). There seems to be no dispute that the quiet title action lies. Neither Lee II nor Lee IV held that it does not.

[17] Mott v. Clemons Bros. Lumber Co., Inc., 247 So.2d 148 (La.App. 1971); Mott v. Smith, 273 So.2d 675 (La.App. 1973).

[18] Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), reh. den. 521 F.2d 815, cert. den. 96 S.Ct. 2275, 425 U.S. 950, 48 L.Ed.2d 830.

[19] Mitchell v. Bertolla, 340 So.2d 287 (La. 1976).

The opinion review of which petitioner seeks held Lee II, which had claimed to state an underlying action to quiet title to support a declaratory judgment, to be res judicata to Lee IV below. The opinion states:

> "Plaintiff ... characterized this action as one 'to quiet title and of no other cause of action whatsoever and specifically not of the "action of nullity or recision." ' Because recovery on this theory was advanced by Lee in Lee II - and rejected by the court - the district court correctly dismissed Lee IV on grounds of res judicata.
>
> * * *
>
> "The precise issue in this appeal, whether Lee was entitled to control of its property in an action to quiet title under Louisiana law, was decided against Lee in Lee II in 1980. That determination is clearly res judicata. *R. G. Claitor's Realty v. Juban*, 391 So.2d 394 (La. 1980)." *Eubank v. Lee Lumber Co., Ltd. v. International Paper Co.*, 5th Cir. No. 85-4509 (12/20/85), Appendix D, p. 10.

But although Lee **claimed** that it had stated the action to quiet title in Lee II, the court **rejected** the claim. The District Court's Lee II opinion stated:

> "It is well settled that the nature of the basic action [underlying an action for a declaratory judgment] determines the appropriate prescriptive period. See, e.g., *Giroir v. Dumesnil*, 184 So.2d 1 (La. 1966)." Lee II, Appendix B, p. 5.
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> * * *
>
> **"Obviously, the plaintiff has really brought an action to rescind or nullify a lease.** As mentioned above, the nature of the action determines the appropriate prescriptive period. The prescription applicable to an action for rescission or nullity of a lease is provided by either

Article 3542 or Article 2221 of the Louisiana Civil Code." Lee II, Appendix B, p. 6 (emphasis supplied).

* * *

"Plaintiff cites *Giroir v. Dumesnil*, 184 So.2d 1 (La. 1966), for the proposition that in the case of an action for declaratory judgment the applicable period of prescription is that period applicable to the causes of action underlying the action for declaratory judgment. This does not present any obstacle to our holding that plaintiff's action is barred by either Article 3542 or Article 2221 [governing prescription of the action of nullity or rescission]. **As already indicated above, we consider the basic action underlying plaintiff's action for declaratory judgment to be that of nullity or rescission ...**" Lee II, Appendix B, p. 8 (emphasis supplied).

Even had the District Court's Lee II opinion not been so explicit in holding the cause of action stated to be "nullity or rescission," it was implicit in the dismissal for prescription of that action that the opinion held no other actions to be stated. Otherwise, only that action would have been dismissed, and the others would have been heard.

How, then, can the courts hold for purposes of dismissing a suit (Lee II) that it stated one cause of action ("nullity or rescission"), and hold subsequently for purposes of res judicata that it stated another cause of

action ("quieting title") after all?[20] There seem to be only two possibilities - that Lee II was (as then held) an action of nullity or rescission (not to quiet title), or that it was not. If the former, Lee IV's action to quiet title is a different cause of action. If the latter, the District Court (not Lee) erred in barring Lee from the courts, and Lee should not be penalized by res judicata. *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556 (5th Cir. 1983). In other words, the Lee II opinion can at most be construed to have established that the action before the court was an action of nullity or rescission, not that any future actions filed later would be also.

Arguably, the District Court may have meant in Lee II that prescription of the action of nullity or rescission bars all other actions as well (an unusual view). If so however, the action to quiet title has nevertheless continually accrued anew since the Lee II decision. The Lee II decision would have disposed only of actions accrued to that time, and would not be a bar.[21]

An equally compelling consideration is that limitations does not run against a defense. "The statute

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[20] The citation of R. G. Claitor's Realty in the court's opinion does not clear the matter up. In that case a prior suit for a declaratory judgment (as to whether Juban could build a fence) was held to bar a later one for an injunction (against Juban's building the fence). The cause of action in both suits was the same, i.e., breach of contract (a verbal servitude agreement), as were the underlying facts. If Claitor I, so to speak, had been held prescribed as a tort action grounded on violation of a zoning statute, and dismissed, Claitor II would have been allowed.

[21] Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); International Paper Co. v. Maddox, 203 F.2d 88 (5th Cir. 1953); Green v. Chamberlain, 60 So.2d 120 (La.App. 1952); Chauvin v. Kirchoff, 194 So.2d 805 (La.App. 1967).

of limitations is a shield, not a sword," it is sometimes stated. So long as one party claims an enforceable right to assert an agreement, the other may raise any action (even that of nullity or rescission) it may have to avoid the agreement. This principle has for some time found expression in Article 424, Louisiana Code of Civil Procedure:

> "A prescribed obligation may be used as a defense if it is incidental to, or connected with, the obligation sought to be enforced."

The 1984 revisions to the Louisiana Civil recast the articles governing prescription of the action of nullity or rescission, replacing former Articles 2221 and 3542 with Article 2032. That Article provides specifically:

> "Nullity may be raised at any time as a defense against an action on the contract, even after the action for annulment [formerly the 'action of nullity or rescission'] has prescribed."

A suit by International to enforce the lease, should Lee physically interfere with International's operations, would fail. By what logic is it therefore too late for Lee to obtain a peaceful adjudication of the matter in court?

Imposition of Attorney's Fees

In awarding costs and attorney's fees against petitioner, the Court of Appeals overlooked and did not mention petitioner's evidence of record on the issue whether the appeal is "frivolous." FRAP, Rule 38. The affidavits of record were that, not only is petitioner's point of law not frivolous, it is correct and should prevail. See Appendix E. Petitioner repeatedly challenged International, and International had ample opportunity, to file opposing affidavits and filed none.

Petitioner moved for a hearing on the question of sanctions and attorney's fees, but the motion was denied.

Petitioner submits the refusal to consider evidence on the issue, the imposition of attorney's fees when the only evidence of record was emphatically against it, and the denial of a hearing were a denial of due process under the Fifth and Fourteenth Amendments to the Constitution.

Petitioner hopes the Court will note as well that two of the affidavits, those of Messrs. Gravel and Randolph, were filed by attorneys who practice before Judge Scott and before the Fifth Circuit, and that the Court will come to the appropriate conclusion that the affidavits were not made lightly. Further, though petitioner filed four affidavits, the number could as well have been four thousand. The legal conclusions in them are not controversial.

Aside from the accuracy of petitioner's arguments, in terms of the number of suits filed in the confusing area of the interplay between "res judicata" and "cause of action," Lee and petitioner have so far managed only to tie the apparent record of the unsanctioned Ms. Nilsen (four suits) in the *Nilsen v. Moss Point* cases. Further, even the appellate opinion in Lee IV finds petitioner's arguments meritorious, in that it concludes that only Lee II is res judicata, not (as the District Court concluded) Lee I, II and III.

No doubt the courts should from time to time impose sanctions and award attorneys' fees upon frivolous appeals. For example, if an attorney appealed from a summary judgment stating that the only issue on appeal was whether the findings of fact below were "not clearly erroneous," etc., the appeal would be frivolous - there being no findings of fact at all. This would be an appellant's equivalent of what the Fifth

Circuit did in affirming Lee II and Lee III without opinion, under Local Rule 47.6.

Admittedly the awarding of sanctions, costs and/or attorney's fees against litigants could ultimately have the effect of quieting litigation, even where res judicata would not. Petitioner however deeply regrets to see a United States Court of Appeals resort to such a solution. Petitioner submits that in so doing, the Court of Appeals harms the courts far more than petitioner.

CONCLUSION

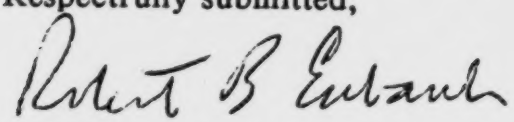
The best that can be said of the Lee cases is that they are unpublished, and lie in relative obscurity. This is also the worst that can be said of them. Over a ten-year period, a clear precedent (the as yet unmentioned *Brewton Lumber Co.* case, which has enjoyed the popularity of a leper at a health spa) has been avoided but not overrruled, and long established principles of res judicata and prescription have not been followed - in a series of cases that as a practical matter are as secret as if they were classified government documents. The cases culminate in the imposition of attorney's fees against the attorney refusing to forget the matter.

Petitioner submits that, while the Lee cases will play little role as precedent among attorneys, they will (if certiorari is denied) become established precedent, if only informally, at the courts of appeal. Denial of certiorari will be understood as meaning the course of action followed in the Lee cases is a permissible manner of disposing of litigation.

Petitioner could at this point shrug off the entire matter, but feels his duty to the courts themselves compel him to bring the matter to this Court's attention. A writ of certiorari should issue to review the judgment of the Fifth Circuit.

May 1, 1986.

Respectfully submitted,



Robert B. Eubank

APPENDICES

Appendix A
Brewton Lumber Co. Case

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

CIVIL ACTION NO. 14,680

L.L. BREWTON LUMBER COMPANY, INC.

versus

CONTINENTAL CAN COMPANY, INC.

MESSRS.

FOR PLAINTIFF — **Hiram J. Wright**
P. O. Box 626
Winnfield, Louisiana 71483

FOR DEFENDANT — **William H. Baker**
Holloway, Baker, Culpepper & Brunson
Post Office Box E
Jonesboro, Louisiana 71251

SCOTT, JUDGE:

This is an action to annul and cancel an instrument styled "Contract for Sale and Purchase of Timber and Land Lease" executed by Louisiana Development Company, Inc., Lessor, in favor of Mansfield Hardwood Lumber Company, Lessee, dated September 9, 1950,

and covering approximately 1360 acres of land in Winn Parish, Louisiana, Plaintiff, L. L. Brewton Lumber Company, Inc., (hereinafter referred to as "Brewton"), is the successor in title of the original lessor, Louisiana Development Company, Inc. and Continental Can Company, Inc. (hereinafter referred to as "Continental"), is the successor in title to the original lessee, Mansfield Hardwood Lumber Company.

The agreement in question provides for the sale of timber and then provides further for a lease for the sole purpose of cutting and removing existing timber and for the growing, cutting and removing of timber *during the term of the lease or any renewal or extension thereof.* (Emphasis supplied). The specific pertinent provisions are the following:

> "2. As a part of the consideration for this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to the terms and conditions hereof, the real estate hereinabove first described for a *term of nine (9) years from the date hereof* for the purposes herein expressed, and *hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewals of this lease for a term of nine (9) years each upon the conditions herein set forth, provided, that this lease may not be extended beyond a date ninety-nine (99) years from the date hereof.* In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.
>
> 3. *Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property*

taxes and local assessments which Seller-Lessor has paid on the land described in this lease during the nine years immediately preceding the expiration of such nine year term.

Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not given, then Buyer-Lessee shall have thirty days after Seller-Lessor gives such notice in which to give notice of intent to renew and to make the payment herein provided for.

4. *During the term of this lease or any renewal or extension thereof, as herein provided*, Buyer-Lessee shall have the right to remove standing or growing timber, wood and forest products from the leased premises; ...

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the *sum of Twenty Thousand and No/100 (20,000.00) Dollars in cash*, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full acquittance is granted therefor; *the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee.*

* * *

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-Lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of Fifty and No/100 ($50.00) Dollars per acre on the

lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure." (Emphasis supplied).

In the first hearing this Court did not consider the validity of the 1950 contract as a timber sale with a stipulated term for removal. This question was not before the Court, since plaintiff made no demand for timber cut before 1967. No party has claimed that the 1950 contract was not a valid sale agreement. However, this Court did consider the validity of the agreement as a lease and, for reasons stated in that opinion, held the agreement to be invalid as a lease. The Court of Appeals reversed in part, holding that the agreement was valid as a lease agreement for the original nine year term thereof, "the basic lease," and remanded "for consideration of the undisposed of issues."

This agreement, by its own terms, is not a 99 year lease. It provides for a nine year lease, with options to renew for a term of nine years each, not in excess of ninety-nine (99) years from the date of the instrument.

The Court of Appeals, in its interpretation of the agreement in question, found that the $20,000 consideration was paid for the sale of the timber, the initial nine year term of the lease, and the options to renew the lease. It also found the rent or consideration for each nine year renewal period to be an amount equal to the real property taxes and local assessments Seller-Lessor had paid on the land during the nine years immediately preceding the expiration of such nine year term. Therefore, the issue now before this Court is whether or not this is a valid rent or consideration under Louisiana law.

The Civil Code of Louisiana spells out the requirements for a valid lease in the following articles:

Art. 2669: Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.

Art. 2670: To the contract of lease, as to that of sale, three things are absolutely necessary, to-wit: the thing, the price and the consent.

Art. 2671: The price should be certain and determined and should consist of money.

Art. 2674: To let out a thing is a contract by which one of the parties binds himself to grant to the other enjoyment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him.

Under the provisions of Article 2464 of the code in the amount of the rent must be serious, that is the amount of the rent cannot be out of all proportion to the value of the lease.

The landmark decision in Louisiana on the doctrine of serious consideration is *Murray v. Barnhart*, 117 La. 1023, 42 So. 489 (1906). In considering the validity of the lease before it the Louisiana Supreme Court stated:

> "At common law 'the slightest consideration is sufficient to support the most onerous obligation. The inadequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' 9 Cyc. 365; A. & E. E. vol. 6., p. 694. But under our law the consideration 'must be serious:' 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code. That article has special reference to the price of a sale, but the principle it involves is not peculiar to sales. It is a general principle of the civil law, and as old as the civil law itself."

Another case involving the validity of a lease in the city of Monroe is *Northeast Louisiana Detachment of Marine Corps League v. City of Monroe*, 253 So. 2d 107 (1971) in which the Louisiana Court of Appeals, Second Circuit, stated, as follows:

> "A lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing 'at a fixed price.' LSA Civil Code Article 2669. Three elements are essential to a valid lease - the thing, the price and the consent. LSA Civil Code Article 2670. Article 2671 provides that the price should be 'certain and determinate' and Article 2674 requires a 'certain stipulated price.' Article 2464 sets forth the essential elements of the price of a sale and requires that the price must be 'certain,' 'fixed and determined' and, most significantly, 'serious' and 'not to be out of all proportion with the value of the thing.' The civil law doctrine embodied in Article 2464 applies to all other contracts as well as to sales. *Blanchard v. Haber*, 166 La. 1014, 118 So. 117 (1928)."

The renewal periods or extensions of the lease are extremely valuable to the lessee. The agreement covers 1360 acres (only as undivided 3/5 interest in 260 acres thereof). In paragraph 13 of the Stipulation, defendant admits it cut in 1951 and 1952 the following amounts of timber:

Pine Saw Logs	115,062 board feet
Hardwood Law Logs	9,201 board feet
Pine Pulpwood	34.97 cords
Hardwood Pulpwood	17.44 cords.

It further admits in Paragraph 15 that it has continued to cut timber on the land up until 1969, but has no records showing the amount of timber cut. The amount of timber situated on these tracts, as of the date of trial, is stipulated (Par. 8 & 9) to be the following:

	1100 Acre	260 Acre
Pine Saw Logs (board feet)	1,470,720	1,218,260
Hardwood Saw Logs (board feet)	88,560	84,240
Pine Pulpwood (cords)	7,530	340

Applying the stipulated present day stumpage values (Stipulation p. 10) to these figures, the value of the lease for the nine year period beginning 1968 is $178,120 ($113,400 on the 1100 acre tract and $64,720 on the balance).* The ordinary timber lease would provide that the lessor receive as rent a reasonable percentage of the monetary return from the timber cut. This lease provides no such rent or similar payment to the Lessor. Lessor will receive nothing from the products of the land, in money or in kind.

Certainly it is contemplated under the doctrine of serious consideration that the Lessor realize some profit from the lease in the form of rent. However on the face of this agreement the Lessor is guaranteed a loss. The only rent stipulated is the reimbursement of taxes, without interest, 9, 8, 7, 6, 5, 4, 3, 2 and 1 years after the Lessor has paid them. Under this type of arrangement no profit to the Lessor is conceivable. Furthermore, the Lessor is permitted to occupy and use the land for a lesser sum than if he were the fee owner. To illustrate these facts, in the first nine year renewal period of the lease, the Lessee paid only $2,728.48 in rent while the owner was paying $4,022.82 in current taxes and assessments. Surely this cannot be considered serious consideration, even if there were no timber on the property and the land was bare. Under no condi-

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* As stipulated (Par. 11), timber on the property grows and has grown approximately six (6%) per cent to seven (7%) per cent per year. During a renewal period of 9 years the land would produce in natural growth alone, without the expenditure of one single dime by Continental, additional growth of approximately $96,183 to $112,212.

tions can rent, consisting solely of the reimbursement of taxes, be considered serious consideration as contemplated by Louisiana law.

The term of the original lease having expired, there being no valid provisions for the extension or renewal thereof, judgment will be granted cancelling and erasing the 1950 lease agreement from the public records and reserving plaintiff's right to sue for damage.

Formal judgment should be submitted for execution in compliance with Rule 9(e) of this Court.

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 8th day of December 1972.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Appendix B
Lee II

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

* * * * * * * * * * * * * * * * * * * *

LEE LUMBER COMPANY : CIVIL ACTION
-vs- : NO. 77-1097
INTERNATIONAL PAPER COMPANY

* *

RULING ON MOTION

This matter is presently before us on a motion for summary judgment under Rule 56 filed by defendant International Paper Company (hereinafter "International"). Jurisdiction is based on diversity of citizenship. 28 U.S.C.A. Sec. 1332.

The pleadings and exhibits establish the following facts beyond dispute. On June 1, 1946 plaintiff Lee Lumber Company, Ltd. (hereinafter "Lee Lumber") leased approximately 18,000 acres of timber land located in the Parishes of Rapides, Grant and Avoyelles to International. The lease provided for an annual rental payment of $1,400, payable in January. The lease term was for 61 years and 5 months, commencing January 1, 1945.

On September 18, 1973 Lee Lumber filed suit in the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, alleging that the aforementioned lease was a *nudum pactum* and void *ab initio* on several grounds: First, the lease contained a potestative condition in that the lessee had the unilateral right to cancel

the lease; second, the lease lacked serious consideration since the annual rental amounted to approximately 7.7 cents per acre whereas the potential commercial timber growth was valued at $5 per acre at the time the lease was entered; third, the rental payments were lesionary since they were less than one-half the value of the rights granted under the lease. It was also alleged that International had not paid the taxes as obligated by the lease. Lee Lumber prayed for the following relief: That the lease be declared null and void; that the recordation of the lease be cancelled; and that it be placed in full possession of the land, free and clear of the lease.

The trial court sustained International's peremptory exception of prescription. The Second Circuit Court of Appeal affirmed this ruling. *Lee Lumber Co., Ltd. v. International Paper Co.*, 321 So.2d 42 (1975). At the outset the Court of Appeal rejected Lee Lumber's contention that the unilateral right of the lessee to cancel the lease was a potestative condition under the Louisiana Civil Code. The Court then found that the action to cancel the lease for lack of serious consideration had prescribed under either Louisiana Civil Code art. 3542, which provides that an action for nullity or rescision of contract prescribes in 5 years, or Louisiana Civil Code art. 2221, which provides that an action for nullity or rescision of an agreement prescribes in 10 years whenever a shorter period is not applicable. The Court then determined that the doctrine of lesion was not applicable and, in any event, the action for lesion prescribed in 4 years under Louisiana Civil Code arts. 1862 and 1867. However, the Court found that the cause of action based on the alleged failure of International to pay the annual rentals and taxes had not prescribe since this obligation was a continuing one. The issue was remanded to the trial court for determination of whether the failure of International to perform its

rental obligations gave Lee Lumber cause to dissolve the lease.

On remand the trial court held that Lee Lumber was equitably estopped from cancelling the lease because of International's failure to pay or timely pay the taxes as agreed. The Court of Appeal agreed. *Lee Lumber Company, Ltd. v. International Paper Co.*, 345 So.2d 212 (La.App. 3rd Cir. 1977), *writ denied* 347 So.503. In the lease entered into on June 1, 1946, Lee Lumber explicitly agreed to pay the taxes assessed against the land and it was implicit that International would pay the taxes assessed against the timber. In 1950 the lease was amended to provide that International would pay the taxes assessed against both the land and timber to the extent they were in excess of the $1400 annual rental upon Lee Lumber's submission of tax receipts showing payment of taxes for the year currently due. Lee Lumber alleged that International had failed to perform its obligations in two respects, viz., that it did not pay any of the taxes for the period 1946 to 1950 and beginning in 1951 International made payments for taxes paid by Lee for the previous year rather than those for the year currently due. As to the non-payment of taxes the record established that the taxes were always assessed in the name of Lee Lumber and Lee Lumber never made any demands for payment. Concerning the late payment of taxes the Court found that the record indicated that Lee Lumber had always accepted the payments after the date they were due and never made any demand to the contrary. The Appellate Court concluded that the trial court was correct in holding that Lee Lumber was equitably estopped from demanding the cancellation and voidance of the lease and stated:

> "As in this case, where a lessor, by his conduct - no demand for taxes during the years 1946 to 1950; accepting of rental payments for the years 1951 thru 1973, after the date on which they

were due - creates a custom by which the lessee is led into a false sense of security that it has complied with its obligations as lessee, the lessor thereby waives his rights to cancel the lease and is estopped from doing so." *Id.* at 214.

On September 30, 1977 Lee Lumber filed the instant action seeking a declaratory judgment that the lease is null and void and declaring it to be entitled to immediate possession of the 18,000 acres. In addition, plaintiff seeks an injunction restraining defendant from entering the land and restitution for any timber cut by defendant.

In its motion for summary judgment International has raised defenses of *res judicata*, prescription and equitable estoppel. For the reasons set forth below, we hold that the plaintiff's action has prescribed under arts. 3542 and 2221 of the Louisiana Civil Code.

Plaintiff has asked this court to declare a lease entered into over thirty years ago null and void. Plaintiff alleges in his complaint that the lease is void under Louisiana law because it contains a potestative condition, lacks serious consideration and is uncertain as to object price and term. In its complaint plaintiff alleges that the action for declaratory judgment is based on four underlying causes of action, to wit: (1) a possessory action; (2) an action to quiet title; (3) an action for recovery of a thing not due; and (4) an action for eviction. The complaint also states that all of the un-

derlying causes of action are based on the invalidity of the lease.[1]

It is well settled that the nature of the basic action determines the appropriate prescriptive period. *See, e.g. Giroir v. Dumesnil*, 184 So.2d 1 (La. 1966), and *Giuffria Realty Co., Inc. v. Kathman-Landry, Inc.*, 173 So.2d 329 (La.App. 4th Cir. 1965).

In *Giuffria* the plaintiff sold some property to a third party in 1927 who subsequently sold the property to defendants in 1947. The plaintiff brought an action to remove cloud from title contending that the 1927 transfer was invalid for various reasons, that it should be decreed the owner of the property and that various notarial acts transferring the property be cancelled from the public record since they created a cloud on its title. In spite of the fact that plaintiff had brought his action as one for the removal of a cloud from title, the court determined that it was in reality an action seeking to nullify or rescind the 1927 transaction. In finding that the trial court had properly maintained the defendant's defense of prescription the court stated:

> "Prescription to apply to a cause of action is determined by the nature of the action. Herein, since the action is one of nullity or rescision,

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[1] For example, Paragraph 12 of the complaint alleges:

CAUSE OF ACTION FOR RECOVERY OF THING NOT DUE

(a) Under Louisiana law, plaintiff, having surrendered to defendant a thing (the 18,000 acres and timber cut from them) which was not due, because of the invalidity of the lease, has a cause of action to recover it;

(b) The only claim defendant has to the retention of the 18,000 acres of timber land, and timber cut from such lands, or the proceeds thereof, is the 1946 lease.

(c) The lease, for the reasons noted above, is void under Louisiana law.

the ten year prescription of LSA-C.C. art. 2221 would apply."

Plaintiff has asked this court to declare the 1946 lease invalid. All of the so-called underlying causes of action are predicated on the alleged invalidity of the lease. Obviously the plaintiff has really brought an action to rescind or nullify a lease. As mentioned above, the nature of the action determines the appropriate prescriptive period. The prescription applicable to an action for rescission or nullity of a lease is provided by either Article 3542 or Article 2221 of the Louisiana Civil Code. Article 3542 provides, in pertinent part:

"The following actions are prescribed by five years: that for the nullity or rescission of contracts,[2] testaments or other acts."

Article 2221 provides, in pertinent part:

"In all cases, in which the action of nullity or of rescission of an agreement, is not limited to a shorter period by a particular law, that action may be brought within ten years."

The lease that plaintiff seeks to have declared null and void was entered into on June 1, 1946 - more than 27 years before plaintiff first attempted to nullify the lease in state court. Without a doubt, plaintiff's action in this court to nullify and invalidate the lease has prescribed long ago under the terms of either Article 2221 or 3542.

However, the prescriptive periods of Articles 3542 and 2221 apply only to relative nullities; they do not

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[2] Needless to say, a lease is a contract. Article 2669 of the Louisiana Civil Code provides: "Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor at a fixed price."

run against absolute nullities. *Fried v. Bradley*, 52 So.2d 247 (La. 1950). Absolute nullities are those that are in derogation of public order and good morals whereas relative nullities are those established in the interest of individuals. The theory behind the prescription applicable to an action for nullity or rescission is that a person is presumed to ratify the defects in an act when he does nothing about them over a period of time. Absolute nullities are insusceptible of ratification because the "ratification would itself be tainted with the vices reprobated in the act sought to be ratified." *Id. at 252.*

Herein the defects in the lease are alleged to be the lack of serious consideration, the presence of a potestative condition and uncertainty of object, term and price. Both lack of adequate consideration, *Giuffria Realty Co., Inc. v. Kathman-Landry, Inc.*, *supra*, and uncertainty of object, price and term, *Prestridge v. Humble Oil & Refining Co.*, are considered to be relative nullities and subject to ratification.

We need not consider whether the presence of a potestative condition constitutes an absolute nullity because we find that the lease does not contain one. The potestative condition alleged to exist herein is the unilateral right of the lessee to cancel the lease. This contention has already been rejected by the courts of Louisiana. *McCain v. Continental Can Co.*, 299 So.2d 454 (La.App. 2d Cir. 1974), *writ refused* 302 So.2d 308; *Thibodeaux v. Boeuf Land Co., Inc.*, 303 So.2d 576 (La.App. 1st Cir. 1974).

Plaintiff argues that he can avoid the prescriptive periods applicable to actions for nullity or rescission by bringing his action as one for declaratory judgment based on underlying causes of action (the possessory action, the action to quiet title, the action of eviction, and action for recovery of a thing not due) that he al-

leges have not prescribed. Plaintiff maintains that defendant must respond to the above action by asserting his rights under the lease by a counter-claim or separate action. Plaintiff's scenario then contemplates that he would respond by asserting an action for nullity or rescission which would not be barred by prescription because Louisiana Code of Civil Procedure art. 424 provides that a prescribed cause of action may be raised as a defense.

We find plaintiff's argument unpersuasive because it is not supported by Louisiana jurisprudence and more fundamentally, because its acceptance would result in an emasculation of the Louisiana prescription law in the area of nullity and rescission.

Plaintiff cites *Giroir v. Dumesnil*, 184 So.2d 1 (La. 1966), for the proposition that in the case of an action for declaratory judgment the applicable period of prescription is that period applicable to the causes of action underlying the action for declaratory judgment. This does not present any obstacle to our holding that plaintiff's action is barred by either Article 3542 or Article 2221. As already indicated above, we consider the basic action underlying plaintiff's action for declaratory judgment to be that of nullity or rescission on which the prescriptive period began to run the day the lease was entered into.

In support of its contention that the underlying causes of action have not prescribed, plaintiff asserts that the action to quiet title and the possessory action accrue as long as the lease, i.e., the cloud on the title or the disturbance in possession remains in existence. The cases of *Dixon v. American Liberty Oil Co.*, 77 So.2d 533 (La. 1954), *Green v. Chamberlain*, 60 So.2d 120 (La.App. 1st Cir. 1952), and *Chauvin v. Kirckhoff*, 194 So.2d 805 (La.App. 1st Cir. 1967), are cited in support. However, these cases merely hold that the

continued existence of a lease on the public records, as well as the initial recordation, constitute a cloud on the title or disturbance in possession. None of the cited cases were concerned with the applicability *vel non* of articles 3542 or 2221.

Plaintiff also asserts that an action for the recovery of a thing not due does not accrue and the prescription does not begin to run until the time of the repudiation of the void agreement. Plaintiff cites the case of *Lagarde v. Dabon*, 98 So. 744 (La. 1923) in support. However, that case did not involve a situation where a party to a contract was attempting to have it invalidated or rescinded. Rather it was concerned with the situation where a party to a partnership that the court considered invalid because it was not reduced to writing sought to recover assets she had invested in the partnership from the heirs of the other partner.

Plaintiff cites no authority in support of his contention that he can avoid the application of the Louisiana Civil Code articles governing the prescription applicable to actions for nullity or rescission by bringing an action for eviction.

If we accepted plaintiff's argument, then a party to a contract made years ago that no longer considered the contract economically advantageous could simply search the contract for some technical error and then bring a declaratory judgment based on the underlying causes of action as specified by plaintiff. Quite plainly, plaintiff's argument files in the face of articles 2221 and 3542 and the basic policy of the law they serve.

> "The genius of our law does not favor the claims of those who have long slept on their rights, and who, after years of inertia, conveying an assurance of acquiescence in a given state of things, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief, under

the effect of a newly discovered technical error in some ancient transaction or settlement." *Lafitte, Dufilho & Co. v. Godchaux*, 35 La.Ann. 1161, 1163 (1883).

Accordingly, the defendant's motion for summary judgment is granted.

A form of judgment consistent with this opinion should be submitted within ten days of date.

Alexandria, Louisiana, this the 7th day of November, 1978.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 79-1309

LEE LUMBER COMPANY, LTD.,
Plaintiff-Appellant,

versus

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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(May 15, 1980)

Before GODBOLD, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Appendix C
Lee III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

-vs- : CIVIL ACTION NO. 82-1446

INTERNATIONAL PAPER COMPANY

RULING

The present action before this court is a Motion to Dismiss for failure to state a claim upon which relief can be granted by plaintiff, Lee Lumber Company (hereinafter "Lee") against defendant, International Paper Company (hereinafter "International"). We converted the motion into one for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.[1] Specifically, this action arises out of a lease agreement between Lee Lumber Company as lessor and International as lessee, involving certain immovable property located in the parishes of Rapides, Grant and

---

[1] By Minute Entry on December 1, 1982, we converted defendant's 12(b)(6) motion to one for summary judgment pursuant to rule 56, Federal Rules of Civil Procedure.

Avoyelles, constituting approximately 18,000 acres.[2] Suit was filed in this court on June 9, 1982 as a shareholder's derivative action by Robert Eubank, on behalf of all shareholders of Lee Lumber Company against International Paper Company. Plaintiff has asserted a possessory cause of action, alleging that its possession was disturbed as a result of the purported lease between Lee and International Paper Company. Plaintiff has asserted a possessory cause of action, alleging that its possession was disturbed as a result of the purported lease between Lee and International that was recorded by International on June 26, 1946. Consequently, Lee Lumber Company is seeking to be placed in possession of the land in question.

There have been several lawsuits filed regarding the particular property in question, between the same parties. The first suit, entitled *Lee Lumber Company v. International Paper Company*, No. 88-339, was filed on September 18, 1973 in the Ninth Judicial District Court, Rapides Parish, Louisiana. Lee Lumber sought to have a certain lease declared null and void,[3] and to be placed in possession of the land.[4] The trial court sustained defendant's peremptory exception of prescription. Thereafter, Lee Lumber appealed to the Court of Appeal, Third Circuit, State of Louisiana.

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[2] By a prior agreement, Lee had sold all of the timber on the land to International. The primary purpose of the lease was future use of the land in growing timber. The lease was entered into on June 1, 1946, and International took possession on that date. The lease term was for 61 years and 5 months.

[3] This is the same lease in question presently before the court, executed in 1946.

[4] The causes of action at the trial court level were: (a) potestative condition; (b) 5 and 10 year prescription, Civil Code 3542, Civil Code 2221; (c) lack of serious consideration; (d) lesion beyond moiety; (e) rent and taxes not paid.

Lee Lumber Co. v. International Paper Co., 321 So.2d 42 (La.App. 1976), *writ refused*, 324 So.2d 423 (La. 1976). The Court of Appeals affirmed in part, reversed in part, and remanded.[5] Subsequently, this decision was affirmed by the Court of Appeal, Third Circuit, State of Louisiana. *Lee Lumber Co. v. International Paper Co.*, 345 So.2d 212 (La.App. 1977), *writ refused*, 347 So.2d 503 (La. 1977).

Thereafter, on September 30, 1977, suit was filed before this court entitled *Lee Lumber Co. v. International Paper Co.*, No. 77-1097-A. Lee Lumber sought a declaratory judgment that a lease was void, and sought possession.[6] The suit was disposed of by summary judgment in which we held that the main cause of action, that of nullity and rescission of a lease had prescribed.[7] Our ruling was affirmed by the Fifth Circuit Court of Appeals. *Lee Lumber Co. v. International Paper Co.*, No. 79-1309.

Robert Eubank then filed the present action before this court asserting the possessory cause of action.

Louisiana Code of Civil Procedure defines possessory action in Article 3655:

> "A possessory action is one brought by the possessor of the movable property or of a real right to be maintained in his possession of the property or enjoyment of the right when he has

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[5] The issue as to a contractual provision in the lease for payment of taxes was remanded. The trial court held that plaintiff was estopped from raising this issue and held for International Paper Company.

[6] The underlying causes of action were: (a) possessory action; (b) action to quiet title; (c) recovery of a thing not due; (d) eviction; (e) potestative condition; (f) uncertainty of thing leased, price and term; (g) absence of serious consideration.

[7] Judgment signed December 15, 1978.

been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted."

Furthermore, several requisites must be met in order to be able to maintain the possessory action. Article 3658, Louisiana Code of Civil Procedure, reads:

"To maintain the possessory action, the possessor must allege and prove that: (1) he had possession of the immovable property or real right at the time the disturbance occurred; (2) he and his ancestors in title have such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud; (3) the disturbance was one in fact or law, as defined in Article 3659; and (4) the possessory action was instituted within a year of the disturbance. See *Plaisance v. Collins*, 365 So.2d 608 (La.App. 1978)."

The prescriptive period relative to the possessory action is found in Civil Code art. 3456:

"But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning from the time when he was disturbed; for if he leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he hay have had to it, and shall be driven to his action for the ownership of the property."

The issues we are concerned with are whether or not the possessory action asserted by Lee Lumber Company was brought within one year of the alleged disturbance, that being the recordation of the lease by International in 1946 and whether or not there has been

a "disturbance."[8] Lee Lumber argues that the prescriptive period is continuous throughout the disturbance,[9] and therefore the action does not have to be brought until one year after disturbance. La.C.C. art 3456. However, a lessor and a lessee may not ordinarily assert the possessory action against each other. Their respective rights are governed by the lease. *Trinidad Petroleum Co. v. Pioneer Natural Gas*, 381 So.2d 808 (La. 1980), *rehearing denied*, April 8, 1980. *See also Developments in the Law, 1979-1980 Mineral Rights*, 41 La.L.Rev. 344. Only in instances when it is manifest that a lease is void can a lessor assert the possessory cause of action. *Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 38 So. 932 (La. 1905). Quoting the court:

> "In a suit, if the lessors wish to avail themselves, as in this case, of their right as owners, and the defendants meet their action by pleading that they are in possession under a valid lease, and sustain their plea to the extent sufficient at least to show that the lease is not void, the plaintiffs are not then in a position to sustain their possessory action. *Supra* at p. 934."

Under a valid lease agreement, lessor and lessee cannot possess adversely to one another. Rather, a "predial lessee is considered as possessing for his lessor ..." La.C.C.P. art. 3656.

In plaintiff's earlier suit before this court, our ruling granting defendant's Motion for Summary Judgment was dispositive of the entire claim. We held that the lease in question between the parties was not subject to attack because the cause of action for nullity or

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[8] All other requirements of Article 3658, La.C.C.P., are not in dispute.

[9] Citing Dickson v. American Liberty Oil Co., 77 So.2d 533 (La. 1954); Green v. Chamberlain, 60 So.2d 120 (La.App. 1967); Chauvin v. Kirchoff, 194 So.2d 805 (La.App. 1967).

rescission of a lease had prescribed.[10] That being the case, International Paper Company, as lessee, is possessing under a valid lease agreement.[11] Therefore, there being no disturbance, the possessory action, which plaintiff states is his only cause of action,[12] is not a proper action before us. Therefore, defendant's Motion for Summary Judgment is granted, as this suit is without any genuine issue of material fact.

DONE AND SIGNED at Alexandria, Louisiana, on this the 3rd day of February, 1983.

Nauman S. Scott
United States District Judge

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[10] Cause of action was nullity of a lease and included the underlying causes of action which were inter alia a possessory action.

[11] Assuming arguendo that the lease was void, then plaintiff would be correct in his assertion that the action could be brought within one year after the disturbance.

[12] See affidavit of Robert Eubank filed December 13, 1982.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

-vs- : CIVIL ACTION NO. 82-1446

INTERNATIONAL PAPER COMPANY

AMENDED RULING

In the court's ruling on February 3, 1983 the first sentence of the first paragraph as corrected should read:

The present action before this court is a Motion to Dismiss for failure to state a claim upon which relief can be granted by defendant, International Paper Company (hereinafter "International") directed to plaintiff, Lee Lumber Company (hereinafter "Lee").

DONE AND SIGNED at Alexandria, Louisiana, on this the 23rd day of February, 1983.

Nauman S. Scott
United States District Judge

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 83-4112

ROBERT B. EUBANK, Individually and On Behalf of All Other Shareholders of Lee Lumber Company,
Plaintiff-Appellant,

versus

LEE LUMBER COMPANY, LTD., a Corporation, and INTERNATIONAL PAPER COMPANY, a Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(October 27, 1983)

Before POLITZ, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 47.6.

Appendix D
Lee IV

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

-vs- : CIVIL ACTION NO. 83-2809

LEE LUMBER COMPANY, LTD., ET AL

RULING

This matter is now before us on a Motion for Summary Judgment filed by the defendant, International Paper Company (IPC). In support of its motion, IPC argues that res judicata bars the instant suit.

We agree.

There have been several actions filed regarding the property in question in this lawsuit and the lease which Eubank now seeks to have declared null and removed from the public records.

The first action, captioned *Lee Lumber Company v. International Paper Company*, Civil Action No. 88-339, hereinafter referred to as "Lee I," was filed on September 18, 1973 in the Ninth Judicial District

Court, Rapides Parish, Louisiana. In that suit the plaintiff sought to have the lease declared null and void and to be placed in possession of the property. Lee I was dismissed on the grounds of prescription. The trial court's ruling was affirmed in *Lee Lumber Company v. International Paper Company*, 345 So.2d 212 (La. App. 3rd Cir. 1977), *writ denied*, 347 So.2d 503 (La. 1977).

The second action was filed in this court on September 30, 1977 captioned *Lee Lumber Company v. International Paper Company*, Civil Action No. 77-1097-A, and hereinafter referred to as "Lee II." A declaratory judgment was sought in that matter based on four underlying causes of action, to-wit: (1) a possessory action; (2) an action to quiet title; (3) an action for recovery of a thing not due; and (4) an action for eviction. Summary judgment was granted in that action because the underlying cause of action, that of nullity or rescission of the lease, had prescribed. That ruling was affirmed by the Fifth Circuit. *Lee Lumber Company v. International Paper Company*, Civil Action No. 79-1309.

The third action was filed in this court on June 9, 1982, captioned *Robert B. Eubank, Individually and on behalf of all other shareholders of Lee Lumber Company, Ltd. v. International Paper Company*, Civil Action No. 82-1446-A, and hereinafter referred to as "Lee III." That matter was styled as a possessory action. Summary judgment was also granted in Lee III for basically the same reasons as Lee II.

La. C.C. Art. 2286 sets forth the requirements of res judicata:

> " ... the thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same

parties, and formed by them against each other in the same quality."

The term "the same cause of action" in Article 2286 is a mistranslation. The article should read "the same cause." *R. G. Claitor's Realty v. Juban*, 391 So.2d 394 (La. 1980).

In the complaint, the plaintiff, Robert B. Eubank (Eubank), has asserted that this is an action to quiet title and that no other cause of action is being asserted.

We find that there is no genuine issue of material fact that the thing demanded in this suit is the same as that which was demanded in Lee I, Lee II, and Lee III. The plaintiff is seeking to have the lease, the 1950 amendment, and the timber sale declared invalid and to have those documents removed from the public records of Rapides, Grant and Avoyelles Parishes.

The plaintiff's assertion that the present suit is a different cause of action* does not make his *cause* in this suit different from Lee I, Lee II or Lee III. "The proper interpretation of Article 2286 requires a consideration of the broader concept of cause at civil law rather than the common law cause of action." *R. G. Claitor's Realty v. Juban*, *supra* at p. 397; *Mitchell v. Bertolla*, 340 So.2d 287 (La. 1976); *Sliman v. McBee*, 311 So.2d 248 (La. 1975). We find that there is no genuine issue of material fact that the plaintiff's cause or ground on which the demand is founded in this lawsuit is the same as the plaintiff's cause in Lee I, Lee II, and Lee III.

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* We find this assertion untrue. In Lee II the plaintiff stated that his action for a declaratory judgment was supported by four underlying causes of action, one of which was an action to quiet title.

We also find that there is no genuine issue of material fact that the parties in the instant suit are essentially the same as in Lee I and Lee II; and exactly the same as in Lee III.

For the reasons stated above, we find that the judgments in Lee I, Lee II, and Lee III are res judicata and that the mover is entitled to summary judgment as a matter of law. We need not discuss the prescription issue as res judicata is dispositive of this matter.

We now turn to the matter of sanctions. The defendant, IPC, has counterclaimed for an award of attorney's fees and damages for what IPC has characterized as Eubank's initiation of vexatious and harassing litigation with no reasonable expectation of success when view from the standpoint of a prudent legal approach and designed merely to cause IPC further effort and expense in presenting a defense. IPC has reurged its request for sanctions in this Motion for Summary Judgment.

The request for sanctions is DENIED; however, this matter, having been litigated several times, should not appear in this court again. Valuable time and money has been wasted and an unnecessary burden has been placed upon this court by the plaintiff's persistence in relitigating the same dispute. Any future attempt by plaintiff to relitigate these matters will be filed at the risk of whatever sanctions (including but not limited to dismissal, and an award of attorney's fees and other damages), deemed appropriate by this court.

It is hereby ORDERED that the Motion for Summary Judgment be GRANTED and that the defendant, IPC, shall submit a judgment in accordance with this ruling within ten (10) days of the signed date.

DONE AND SIGNED at Alexandria, Louisiana this 21st day of June, 1985.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

-vs- : CIVIL ACTION NO. 83-2809

LEE LUMBER COMPANY, LTD., ET AL

SUMMARY JUDGMENT

This cause having regularly come on for hearing on the Motion for Summary Judgment filed by Defendant herein, International Paper Company, on the 30th day of January, 1985, Briefs and/or Memoranda of Authority having been submitted by Counsel, oral argument having been presented by Counsel for Defendant International Paper Company and for Plaintiff, in Open Court, on March 18, 1985, the Court having considered the law and the evidence, the law and the evidence being in favor of Defendant-Mover, International Paper Company, and for written reasons previously assigned, dated June 21, 1985, and filed herein, under date of June 24, 1985:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment be and it is hereby granted and that there be Summary Judgment herein, in favor of Defendant, International Paper Company, and against Plaintiff, Robert B. Eubank, individually and on behalf of all other Shareholders of Lee Lumber Company,

Ltd., forever dismissing in its entirety the Complaint filed herein by Plaintiff in this action, and denying all demands of Plaintiff set forth therein, all at Plaintiff's cost.

Subject to comments set forth in the Ruling of this Court and written reasons previously assigned and filed herein, the request of Defendant, International Paper Company, for sanctions against Plaintiff is denied.

Judgment rendered on June 21, 1985 and signed at Alexandria, Louisiana on this the 11th day of July, 1985.

Nauman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4509
Summary Calendar

ROBERT B. EUBANK,
Plaintiff-Appellant

VERSUS

LEE LUMBER COMPANY, LTD., ET AL.,
Defendants,

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

(December 20, 1985)

Before GEE, RANDALL and DAVIS, Circuit Judges.
PER CURIAM:*

Eubank appeals the dismissal of the fourth lawsuit filed either as a derivative action for Lee Lumber Company or directly for for Lee Lumber Company to have declared invalid a lease between Lee and defen-

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

dant, International Paper Company, and regain possession of the property under lease.

The first action was filed by Lee Lumber Company in state court seeking to cancel a thirty-year old lease covering some 18,000 acres of Louisiana timberland. The district court dismissed the action as prescribed. See *Lee Lumber Company, Ltd. v. International Paper Co.*, 321 So.2d 42 (La. App. 3d Cir. 1975) (aff'd in part); 345 So.2d 212 (La. App. 3d Cir. 1977) (appeal after remand). The second action (*Lee II*) was filed by Lee Lumber Company in federal court. In *Lee II* plaintiff sought a declaratory judgment decreeing that it was entitled to possession of the property in question. Four underlying theories of recovery were asserted in support of the claim for declaratory judgment: a possessory action, an action to quiet title, an action for the recovery of a thing not due, and an action of eviction. The district court held that the claims asserted in that action had prescribed and accordingly dismissed the suit. We affirmed. *Lee Lumber Co., Ltd. v. International Paper Co.*, No. 79-1309 (5th Cir. May 15, 1980). The third action (*Lee III*) was filed in federal court by Eubank, individually and on behalf of other shareholders of Lee Lumber Company against International Paper Company. A possessory action under Louisiana law was asserted in that suit. The district court also dismissed that action as prescribed and we affirmed. *Eubank v. Lee Lumber Co., Ltd.*, No. 83-4112 (5th Cir., October 27, 1983), cert. denied, No. 83-1918 (Oct. 1, 1984).

Plaintiff Eubank filed this action (*Lee IV*) as a derivative action on behalf of the stockholders of Lee Lumber Company. He characterized this action as one "to quiet title and of no other cause of action whatsoever and specifically not of the 'action of nullity or recision.' " Because recovery on this theory was advanced by Lee in *Lee II* - and rejected by the court -

the district court correctly dismissed *Lee IV* on grounds of res judicata.

Although Eubank, as a shareholder of Lee Lumber Company, instituted this suit as a derivative action on behalf of the corporation, the action is nevertheless considered the corporation's action for purposes of res judicata. *Dana v. Morgan*, 232 F. 85, 91 (2d Cir. 1916); *Sample v. Louisiana Oil Refining Corp.*, 162 La. 941, 111 So. 336 (1927).

We next consider appellee's motion for attorney's fees and costs against the appellant for pressing a frivolous appeal. Plaintiff's attempts to regain control over Lee's property as counsel for Lee and as a shareholder have been in the courts for over ten years. As outlined above, appellant was first denied possession of his property by the Louisiana appellate courts in 1975. Since that time he has filed three separate suits in federal court seeking to regain control of the same property. The precise issue in this appeal, whether Lee was entitled to control of its property in an action to quiet title under Louisiana law, was decided against Lee in *Lee II* in 1980. That determination is clearly res judicata. *R. G. Claitor's Realty v. Juban*, 391 So.2d 394 (La. 1980).

Appellant has no colorable argument under Louisiana law to support his theory that *Lee IV* is not precluded by the judgment rendered in *Lee II*. The district court so held in a clear opinion. The appeal is completely meritless and we conclude that appellees are entitled to recover from plaintiff $2500 in attorney's fees plus costs.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-4509

ROBERT B. EUBANK,

Plaintiff-Appellant,

versus

LEE LUMBER COMPANY, LTD., ET AL.,
Defendants,

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(January 31, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-4509

ROBERT B. EUBANK,

Plaintiff-Appellant,

versus

LEE LUMBER COMPANY, LTD., ET AL.,
Defendants,

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12-20-85, 5 Cir., 198_, ____F.2d____)

(February 4, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

Appendix E
Affidavits of Messrs. Chiarkas, Gravel, Randolph and Eubank
Lee IV

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

vs.

LEE LUMBER COMPANY, LTD. CIVIL ACTION NO. 83-2809-A

vs.

INTERNATIONAL PAPER COMPANY

AFFIDAVIT

District of Columbia
United States of America

Before me, the undersigned Notary Public, personally came and appeared Nicholas L. Chiarkas, who being first sworn by me did depose and testify as follows:

> "My name is Nicholas L. Chiarkas. I am an attorney at law, and a member of the Alabama and Pennsylvania Bars. I graduated from Temple University Law School in 1978. I am also a graduate of Columbia University, The City University of New York, and New York University, having received Ed.D., Ed.M., M.A., P.G.C., and B.S. degrees. I have been an attor-

ney for seven years. From 1979 to 1984, I was professor of law at Cumberland Law School, Birmingham, Alabama. I am presently the Deputy Chief Counsel, U.S. Senate Permanent Subcommittee on Investigations.

I have read the court opinions in the following cases: *L.L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc.*, 480 F.2d 923 (5th Cir. 1972); *Lee Lumber Co., Ltd. v. International Paper Co.*, 321 So.2d 42 (La.App. 1976), 324 So.2d 423 (La.1976), 345 So.2d 212 (La.App. 1977), 347 So.2d 503 (La. 1977) (hereinafter "Lee I"); *Lee Lumber Company, Ltd. v. International Paper Co.*, U.S.D.C., W.D.La. No. 77-1097 (11/7/78), 5th Cir. No. 79-1309 (5/15/80) (hereinafter "Lee II"); *Lee Lumber Company, Ltd. v. International Paper Co.*, U.S.D.C.W.D.La. No. 82-1446 (2/3/83), amended 2/23/83, 5th Cir. No. 83-4112 (10/27/83) (hereinafter "Lee III"); and the complaint filed in *Lee Lumber Co., Ltd. v. International Paper Co.*, U.S.D.C., W.D.La. No. 83-2809-A (hereinafter "Lee IV").

In my opinion:

Since both Lee I and Lee II were held to state a cause of action of 'nullity or rescission' and dismissed solely for that reason, neither Lee I nor Lee II should be considered a bar to the bringing of Lee IV. Lee IV states a cause of action to quiet title, which was not prescribed in either Lee I or Lee II.

Lee III is not a bar to the bringing of Lee IV, because it was held to state the possessory cause of action. Lee IV states a different cause of action, the action to quiet title. This action (the action to quiet title stated in Lee IV) has not prescribed and does not prescribe so long as an alleged cloud on the title remains of record. Prescription of the action of 'nullity or recission' is not a bar to the bringing of another cause of action such as that to quiet title, even if arising from the same facts.

It appears to me that the bringing of Lee IV is clearly warranted by and in accordance with existing law. And, so long as a lease remains outstanding and the lessee claims performance under it, the lessor may raise any objections the lessor may have to the validity of the lease."

Dated: March 7, 1985

Nicholas L. Chiarkas
Nicholas L. Chiarkas

Sworn to and subscribed before me the 7th day of March, 1985.

Peter L. Huber
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

vs.

LEE LUMBER COMPANY, LTD. **CIVIL ACTION NO. 83-2809-A**

vs.

INTERNATIONAL PAPER COMPANY

AFFIDAVIT

State of Louisiana)
Parish of Rapides)

Before me, the undersigned Notary Public, personally came and appeared James S. Gravel, who being first sworn by me did depose and testify as follows:

"My name is James S. Gravel. I am a practicing attorney at law, and a member of the Louisiana Bar Association. I graduated from the Louisiana State University School of Law in 1959. I have been a member of the Louisiana Bar Association, and a practicing attorney, for 26 years.

I have read the court opinions in the following cases:

L.L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc., U.S.D.C., W.D.La. No. 14680 (12/11/71), 480 F.2d 923 (5th Cir. 1972) (hereinafter "Brewton").

Lee Lumber Co., Ltd. v. International Paper Co., 321 So.2d 42 (La.App. 1976), 324 So.2d 423 (La. 1976), 345 So.2d 212 (La.App. 1977), 347 So.2d 503 (La. 1977) (hereinafter "Lee I").

Lee Lumber Co., Ltd. v. International Paper Co., U.S.D.C., W.D.La. No. 77-1097 (11/7/78), 5th Cir. No. 79-1309 (5/15/80) (hereinafter "Lee II").

Lee Lumber Co., Ltd. v. International Paper Co., U.S.D.C., W.D.La. No. 82-1446 (2/3/83), amended 2/23/83), 5th Cir. No. 83-4112 (10/27/83) (hereinafter "Lee III").

I have also reviewed the complaint filed in *Lee Lumber Co., Ltd. v. International Paper Co.*, U.S.D.C., W.D.La. No. 83-2809-A (hereinafter "Lee IV").

It is my opinion that:

(1) Lee I is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the cause of action of 'nullity or rescission,' and to have prescribed, and dismissed solely for that reason. Lee IV states a different cause of action, the action to quiet title, which has not prescribed. There being no identity of cause of action, res judicata does not apply.

(2) Lee II is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the cause of action of 'nullity or rescission,' and to have prescribed, and dismissed solely for that reason. Lee IV states a different cause of action, the action to quiet title, which has not prescribed. There being no identity of cause of action, res judicata does not apply.

(3) Lee III is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the possessory cause of action. Lee IV states a different cause of action, the action to quiet title, which has not prescribed.

There being no identity of cause of action, res judicata does not apply.

(4) The action to quiet title stated in Lee IV has not prescribed and does not prescribe so long as an alleged cloud on title remains of record. Prescription of the action of 'nullity or rescission' is not a bar to the bringing of another cause of action such as that to quiet title, even if arising from the same facts. In my opinion, so long as a lease remains outstanding and the lessee claims performance under it, the lessor may raise any objections the lessor may have to the validity of the lease. In my opinion, Lee IV is warranted by and in accordance with existing law."

Dated: February 28, 1985

James S. Gravel
James S. Gravel

Sworn to and subscribed before me the 28th day of February, 1985.

Angela McMonagle
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

vs.

LEE LUMBER COMPANY, LTD. **CIVIL ACTION NO. 83-2809-A**

vs.

INTERNATIONAL PAPER COMPANY

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF RAPIDES

BEFORE ME, the undersigned Notary Public, personally came and appeared EDWARD G. RANDOLPH, JR., who, being first sworn by me, did depose and testify as follows:

"My name is Edward G. Randolph, Jr. I am a practicing attorney at law, and a member of the Louisiana Bar Association. I graduated from the Tulane University School of Law in 1967. I have been a member of the Louisiana Bar Association and a practicing attorney for 17 years.

I have read the court opinions in the following cases:

L.L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc., USDC, W.D. La. No. 14680 (12/11/71), 480 F.2d 923 (5th cir. 1972) (hereinafter "Brewton").

Lee Lumber Co., Ltd. v. International Paper Co., 321 So.2d 42 (La. App. 1976), 324 So.2d 423 (La. 1976), 345 So.2d 212 (La. App. 1977), 347 So.2d 503 (La. 1977) (hereinafter "Lee I").

Lee Lumber Co., Ltd. v. International Paper Co., USDC, W.D. La. No. 77-1097 (11/7/78), 5th Cir. No. 79-1309 (5/15/80) (hereinafter "Lee II").

Lee Lumber Co., Ltd. v. International Paper Co., USDC, W.D. La. No. 82-1446 (2/3/83), amended 2/23/83), 5th Cir. No. 83-4112 (10/27/83) (hereinafter "Lee III").

I have also reviewed the complaint filed in *Lee Lumber Co., Ltd. v. International Paper Co.*, USDC W.D. La. No. 83-2809-A (hereinafter "Lee IV").

It is my opinion that:

(1) Lee I is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the cause of action of 'nullity or rescission,' and to have prescribed, and dismissed solely for that reason. Lee IV states a different cause of action, the action to quiet title, which has not prescribed. There being no identity of cause of action, res judicata does not apply.

(2) Lee II is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the cause of action of 'nullity or rescission,' and to have prescribed, and dismissed solely for that reason. Lee IV states a different cause of action, the action to quiet title, which has not prescribed. There being no identity of cause of action, res judicata does not apply.

(3) Lee III is not a res judicata, or any other, bar to the bringing of Lee IV, because it was held to state the possessory cause of action. Lee IV states different cause of action, the ac-

tion to quiet title, which has not prescribed. There being no identity of cause of action, res judicata does not apply.

(4) The action to quiet title stated in Lee IV has not prescribed and does not prescribe so long as an alleged cloud on title remains of record. Prescription of the action of 'nullity or rescission' is not a bar to the bringing of another cause of action such as that to quiet title, even if arising from the same facts. In my opinion, so long as a lease remains outstanding nd the lessee claims performance under it, the lessor may raise any objections the lessor may have to the validity of the lease. In my opinion, Lee IV is warranted by and in accordance with existing law."

DATED: March 18, 1985.

Edward G. Randolph, Jr.
EDWARD G. RANDOLPH, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 18th day of March, 1985.

Tami H. Smith
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ROBERT B. EUBANK, Individually and on behalf of all other shareholders of Lee Lumber Co., Ltd.

vs.

LEE LUMBER COMPANY, LTD. **CIVIL ACTION NO. 83-2809-A**

vs.

INTERNATIONAL PAPER COMPANY

AFFIDAVIT

State of Alabama)
County Jefferson)

Before me, the undersigned Notary Public, personally came and appeared Robert B. Eubank, who being first sworn by me did depose and testify as follows:

"My name is Robert B. Eubank. I am plaintiff in the captioned case.

I am an attorney. I have been a member of the Louisiana Bar Association since 1968, and of the Alabama Bar Association since 1973. I have practiced law for 17 years, for a large publicly owned corporation in Birmingham, Alabama; for a law firm there; and in my own office there. I have also been on the faculty of Cumberland Law School, Birmingham, Alabama, part-time for 4 years and full-time for 1 year. My law degrees are from Harvard Law School (Ll.B., 1967) and New York University (Ll.M. in Taxation, 1973).

I filed the captioned action, and a prior one against the same parties, because in my best judgment prior litigation had not resolved the rights of Lee Lumber Company, Ltd. and International Paper Company as regards the lease which is the subject of the present suit. I have represented myself because in my best judgment I could not afford to hire counsel to represent me, given the size and resources of defendant International Paper Company, and also because I deemed myself competent in the matter. Lee Lumber Company, Ltd. abandoned prior litigation out of concern for its costs. I have no record of Lee's total expenses, but I personally know of $10,500.00 paid by Lee in legal fees.

In the course of litigating the previous case in which I was plaintiff, I spent at least $2,314.57 for which I have cancelled checks or credit card receipts, and $918.08 in Westlaw charges. I am confident I have spent at least this much again, for which I have no records. I have devoted considerable professional time to the matter, as well as committed considerable office, secretarial, and equipment resources to it. Among other things, I prepared the complaint and other pleadings, motions and briefs at the district court level, and reviewed those of opposing counsel. At the circuit court level, I prepared a motion for initial consideration en banc, a principal brief, a reply brief, a motion for reconsideration, and a separate motion for reconsideration en banc, as well as the necessary research and review of filings by opposing counsel. Thereafter, I prepared and had printed a petition for certiorari to the Supreme Court of the United States, and related documents.

I filed the captioned suit solely in the sincere professional opinion and belief:

(1) that prescription of one cause of action does not bar the bringing of others, and

(2) that a prior judgment dismissing a suit or suits for the prescription of one cause of action does not bar the subsequent bringing of another cause of action, and

(3) that International is in breach of the lease.

I did not in any sense file it to vex or harass or cause expense to International Paper Company. It is of no advantage to me whatsoever, whether it is vexed or harassed or caused expense, and for that matter I do not think it has been significantly vexed, harassed or caused expense. I certainly would not in any event spend any of my own time or money to vex it, harass it or cause it expense. Nor have I used the threat of vexation, harassment or expense to attempt to provoke any sort of settlement with International Paper Company. There have been absolutely no discussions of settlement between their counsel and me, nor any attempts by either of us to initiate any such discussions. I would not in fact settle the matter for anything less than the demand of the suit, that the lease be cancelled."

Dated: February 18, 1985

Robert B. Eubank
Robert B. Eubank

Sworn to and subscribed before me the 18th day of February, 1985.

Nancy Hand
Notary Public

Appendix F
Constitutional Provisions and Statutes Involved

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure
Rule 56(c)

Rule 56. Summary Judgment.

* * *

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Federal Rules of Appellate Procedure
Rule 38

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Fifth Circuit Local Rule 47.6

47.6 *Affirmance Without Opinion.*

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Loc. R. 47.6." or "ENFORCED. See Loc. R. 47.6."

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

Louisiana Civil Code
Article 2032

Art. 2032. Prescription of Action. Action for annulment of an absolutely null contract does not prescribe.

Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud.

Nullity may be raised at any time as a defense against an action on the contract, even after the action for annulment has prescribed.

Louisiana Civil Code
Former Article 2034

Art. 2034. Every obligation is null, that has been contracted on a potestative condition, on the part of him who binds himself.

Louisiana Civil Code
Former Article 2221

Art. 2221. In all cases, in which the action of nullity or rescission of an agreement, is not limited to a shorter period by [a] particular law, that action may be brought within ten years.

That time commences in case of violence, only from the day on which the violence has ceased; in case

of error or deception, from the day on which either was discovered, and for acts executed by married women not authorized, from the day of the dissolution of the marriage or of the separation.

With regard to acts executed by persons under interdiction, the time commences only from the day that the interdiction is taken off; and with regard to acts executed by minors, only from the day on which they become of age.

Louisiana Civil Code
Article 2464

Art. 2464. Essential element of price. The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

Louisiana Civil Code
Former Article 3542

Art. 3542. The following actions are prescribed by five years:

That for the nullity or rescission of contracts, testaments or other acts.

That for the reduction of excessive donations.

That for the rescission of partitions and guarantee of the portions.

This prescription only commences against minors after their majority.

28 United States Code 294(b), -(c), -(d), -(e)

294. Assignment of retired Justices or judges to active duty.

* * *

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing

and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired Justice or judge shall perform judicial duties except when designated and assigned.

28 United States Code 137

137. Division of business among district judges.

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.